89-1915

(1)

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1989

BRADLEY ARTHUR,

Petitioner,

v.

HILLSBOROUGH COUNTY BOARD
OF CRIMINAL JUSTICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Bruce S. Rogow
Nova University Law Center
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
(305) 524-2465

Counsel for Petitioner

QUESTIONS PRESENTED

I.

ARE TITLE 42 U.S.C. §1983 ACTIONS BROUGHT IN STATE COURT AGAINST A COUNTY AGENCY RESPONSIBLE FOR OPERATING A COUNTY JAIL BARRED BY FLORIDA'S SOVEREIGN IMMUNITY STATUTE?

II.

DOES HOWLETT V. ROSE, NO. 89-5383, NOW AWAITING DECISION IN THIS COURT, REQUIRE REVERSAL OF THE DECISION BELOW?

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Second District, is not reported. It is reprinted at Appendix, p.1.

JURISDICTION

The decision of the District Court of Appeal was rendered on February 21, 1990. A timely Motion for Rehearing was denied on March 13, 1990. Pet.App.6. This Petition has been filed within 90 days of that date. This Court has jurisdiction pursuant to Title 28 U.S.C. §1257(a).

THE STATUTE INVOLVED

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States ...to the deprivation of any rights privileges

or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FLORIDA STATUTE §768.28(1)

Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope

of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

STATEMENT OF THE CASE

Bradley Arthur sued the Hillsborough County Board of Criminal Justice and two of its employees in Florida state court for injuries received as a result of a beating sustained while a prisoner in the Hillsborough County, Florida jail. The Board of Criminal Justice is responsible for the operation of that jail. The various causes of action were brought pursuant to Title 42 U.S.C. §1983. After the claims against the individual defendants were resolved, the Board of Criminal Justice obtained a summary judgment. Bradley Arthur appealed to the District Court of Appeal, Second District of Florida.

That Court dismissed Arthur's case on February 21, 1990, on the basis of Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987) and Howlett v. Rose 537 So.2d 706 (Fla. 2d DCA). Pet.App.1. Those cases preclude §1983 suits in Florida state courts against

the State (Hill) and against county governmental units (Howlett). The Petitioner had informed the Florida District Court of Appeal of Howlett's pendency in this Court.

Certiorari had been granted last year in Howlett v. Rose, 110 S.Ct. 403 (1989) (No. 89-5383). The case was argued on March 20, 1990. It is awaiting decision at the time this Petition was prepared.

Based upon the pendency of Howlett v. Rose, Petitioner asked the Florida District Court of Appeal to grant rehearing and consider holding Petitioner's case in abeyance pending this Court's Howlett decision. Pet. App. 3-5. The motion was denied. Pet. App. 6.

Petitioner then filed a Motion for Stay (or Recall) of the Mandate, pending his timely certiorari petition to this Court. Pet. App. 7-9. That motion was granted on April 12, 1990. Pet. App. 10.

Therefore, the final disposition of this case rises or falls upon this Court's forth-

coming decision in Howlett v. Rose, No. 89-5383.

REASON FOR GRANTING CERTIORARI

If this Court reverses the Florida District Court of Appeal, Second District, decision in Howlett v. Rose, then certiorari should be granted in this case, and the Second District's decision should be reversed based upon Howlett.

The decision below simply follows the Second District's reasoning in Howlett. Petitioner adopts the arguments made to this Court by the Petitioner in Howlett. Howlett's outcome must determine the outcome in this case. If this Court affirms the Florida District Court of Appeal and holds that §1983 suits may be barred in Florida state courts by state sovereign immunity, then certiorari should be denied in this case.

Therefore this Petition is based solely upon this Court's forthcoming decision in

Howlett v. Rose, and assumes that the Florida District Court of Appeal decision will be reversed.

If for some reason there is no decision this term in Howlett, then Petitioner asks that this Petition be carried over until Howlett is decided. If Howlett is not decided on the merits because of some procedural or jurisdictional reason, then Petitioner requests that certiorari be granted in this case so that the issues presented by Howlett can be presented by this Petitioner.

CONCLUSION

For the foregoing reasons, and if this Court disapproves the reasoning of the District Court of Appeal, Second District of Florida in Howlett v. Rose, then certiorari should be granted and the decision below reversed and remanded for reconsideration consistent with Howlett.

Respectfully submitted,

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(305) 524-2465

Counsel for Petitioner

A P P E N D I X

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BRADLEY ARTHUR,

Appellant,

v.

HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE,

Appellee.

Case No. 89-00435

Opinion filed February 21, 1990.

Appeal from the Circuit Court for Hillsborough County; Morison Buck, Judge.

Bruce Rogow, Ft. Lauderdale, for Appellant.

James E. Thompson of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, for Appellee.

PER CURIAM.

Dismissed. See Hill v. Dep't of Corrections, 513 So.2d 129 (Fla. 1987), cert. denied, ___ U.S. ____, 108 S.Ct. 1024 (1988); Howlett v. Rose, 537 So.2d 706 (Fla. 2d DCA),

review denied, 545 So.2d 1367 (Fla. 1989), cert. granted, __U.S.__, 110 S.Ct. 403 (1989).

LEHAN, A.C.J., and FRANK and PARKER, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA SECOND DISTRICT

CASE NO. 89-00435

BRADLEY ARTHUR,)

Appellant,)

v.) MOTION FOR REHEARING

HILLSBOROUGH COUNTY)
BOARD OF CRIMINAL
JUSTICE,)

Appellee.)
_____/

Appellant Bradley Arthur respectfully requests the Court to grant rehearing in this case and reconsider holding the disposition in abeyance pending the United States Supreme Court's decision in Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA), cert. granted ___U.S.___, 110 S.Ct. 403 (1989), which will be argued and decided within the next four months.

This Court's dismissal will require the Appellant to seek the expensive route of certiorari review solely in order to maintain the status quo of his case pending the Supreme Court's disposition of Howlett. If Howlett is

reversed, this Court's decision in this case will also be reversed. If Howlett is affirmed, the Supreme Court's rationale may offer a reason for not applying Howlett to this case, a case which was brought long before Howlett's advent.

For the foregoing reasons the Appellant seeks rehearing or the holding of this case on this Motion to avoid finality until Howlett is decided in the Supreme Court.

Respectfully submitted,

BRUCE ROGOW
Fla. Bar No. 067999
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(305) 524-2465

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this "Motion for Rehearing" has been furnished to JAMES E. THOMPSON, ESQ., P. O. Box 1438, Tampa, Florida 33601, by U.S.Mail this 27th day of February, 1990.

BRUCE ROGOW

lm-d66

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

MARCH 13, 1990

BRADLEY ARTHUR,	]	
	]	
Appellant,	]	
	]	
v.	]	Case no. 89-00435
	]	
HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE,	]	
	]	
Appellee.	]	
	]	

Counsel for appellant having filed a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

By: /s/Carol L. Storlundm
CHIEF DEPUTY CLERK

c: Bruce Rogow, Esquire
James E. Thompson, Esquire
Hon. Richard L. Ake

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA SECOND DISTRICT

CASE NO. 89-00435

BRADLEY ARTHUR,)

Appellant,)

v.) APPELLANT'S MOTION FOR STAY (OR RECALL) OF THE MANDATE

HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE,)

Appellee.)

_____/

Pursuant to Rule 9.340, Florida Rules of Appellate Procedure, Bradley Arthur respectfully requests that the Court stay issuance of the mandate pending his timely petition for certiorari to the Supreme Court of the United States.

The decision of this Court was based upon Howlett v. Rose, 537 So.2d 706 (Fla. 2d DCA, 1989). Howlett is awaiting decision in the Supreme Court of the United States. It was argued on March 20, 1990. 58 L.W. 3573.

The Appellant intends to petition for

certiorari in order to protect his rights should this Court's decision in Howlett be reversed. That petition will be timely filed and therefore Appellant requests this Court to stay issuance of its mandate pending notice of the timely filing of Bradley Arthur's petition for Writ of certiorari, and upon such timely filing to continue the stay of mandate until the United States Supreme Court rules on the petition.

This Motion is made in good faith, not for the purpose of delay, and is consistent with counsel's obligation to protect his client's interests in light of the impending decision in Howlett v. Rose.

Respectfully submitted,

BRUCE ROGOW
Fla. Bar No. 067999
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(305) 524-2465

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this "Appellant's Motion for Stay (or Recall) of the Mandate" has been furnished to JAMES E. THOMPSON, ESQ., P. O. Box 1438, Tampa, Florida 33601, by U.S.Mail this _____ day of March, 1990.

_____
BRUCE ROGOW

lm-d67

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

APRIL 12, 1990

BRADLEY ARTHUR, Appellant, v. HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE, Appellee.	]]]]]]]]]]]	Case No. 89-00435

Counsel for appellant having filed a motion for stay of mandate in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby granted.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Bruce Rogow, Esquire
James E. Thompson, Esquire
Hon. Richard L. Ake

Supreme Court, U.S.
FILED
JUN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1915

In The

Supreme Court of the United States

October Term, 1990

BRADLEY ARTHUR,

Petitioner,

v.

HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE,

Respondent.

On Petition For Writ Of Certiorari To The Florida Second District Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION

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FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.
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Tampa, Florida 33601
(813) 228-7411
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to grant the Petition for Writ of Certiorari to the Florida Second District Court of Appeal when Petitioner failed to exhaust state remedies by bypassing the Florida Supreme Court and directly petitioning this Court for review.

II. If so, whether this Court, in exercising its discretion, should deny the Petition for Writ of Certiorari to the Florida Second District Court of Appeal when neither sovereign immunity nor jurisdiction were raised as affirmative defenses and Petitioner lost on the merits at the trial court level.

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II. If this Court has jurisdiction, then in exercising its discretion this Court should deny the Petition for Writ of Certiorari to the Florida Second District Court of Appeal because neither sovereign immunity nor jurisdiction were raised as affirmative defenses and Petitioner lost on the merits at the trial court level 7

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FLORIDA CONSTITUTIONAL PROVISION INVOLVED

Fla. Const. art. V, § 3(b) 1

STATUTE INVOLVED

Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

FLORIDA CONSTITUTIONAL PROVISION INVOLVED

Article V, section 3(b) of the Florida Constitution provides in pertinent part:

> (b) JURISDICTION. – The supreme court:
>
> . . .
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.
>
> (7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.
>
> (8) May issue writs of mandamus and quo warranto to state officers and state agencies.

Fla. Const. art. V, § 3(b).

STATEMENT OF CASE

On November 25, 1980, a Tampa police officer arrested Petitioner, Bradley Arthur, and placed him in the Hillsborough County Jail. Petitioner was allegedly attacked by two guards. On August 31, 1984, Petitioner filed this suit for damages against Respondent, Hillsborough County Board of Criminal Justice ("HCBCJ"), for injuries sustained as a result of the attack and based his complaint on Title 42 U.S.C. § 1983. At the trial court level, HCBCJ raised neither sovereign immunity nor jurisdiction as affirmative defenses and prevailed on the merits.

After reviewing all relevant evidence, the Circuit Court held that "There is no material disputed issue of fact" and granted HCBCJ's Motion for Summary Judgment as a matter of law on the merits. Res.App.A,B. Petitioner's Motion for Rehearing was denied, and he appealed to the Florida Second District Court of Appeal. Res.App.C. On December 18, 1989, the District Court ordered Petitioner to file a supplemental brief within 20 days addressing the issue of the effect, if any, of *Hill v. Dep't of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, 108 S.Ct. 1024 (1988) and *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA 1989), *review denied*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, 110 S.Ct. 403 (1989) on the disposition of his appeal. Res.App.D.

Petitioner disobeyed the District Court's order and instead, on January 10, 1990, filed a Motion to Hold his Appeal in Abeyance Pending the United States Supreme Court's Decision in *Howlett v. Rose*. Res.App.E. Although his motion was denied, Petitioner stated in it that "If the Supreme Court reverses this Court's decision in *Howlett*,

then neither *Howlett* nor *Hill* will have any effect on the pending appeal before this Court." Res.App.E,F.

On February 21, 1990, Petitioner still failed to file a supplemental brief and the District Court issued a per curiam opinion dismissing his appeal and citing to *Hill* and *Howlett*. Res.App.G. Petitioner then filed a Motion for Rehearing, which was denied. After having his Motion for Stay of the Mandate granted, Petitioner bypassed the Florida Supreme Court and directly petitioned this Court for review.

SUMMARY OF ARGUMENT

Petitioner failed to exhaust remedies afforded by Florida, thereby depriving this Court of jurisdiction to review the Florida Second District Court of Appeal's dismissal. A litigant must exhaust all avenues of review available in the state's courts in order to seek review of a state court judgment in the United States Supreme Court. The instant Petition for Writ of Certiorari is addressed to the Florida Second District Court of Appeal and not to the Florida Supreme Court, the highest court in Florida. Petitioner has the burden to affirmatively show that the United States Supreme Court has jurisdiction, but he fails to state in his brief that he attempted to invoke the jurisdiction of the Florida Supreme Court. Moreover, Petitioner failed to exhaust state remedies when he disobeyed the District Court's order to file a supplemental brief. Therefore, this Court lacks authority to review the instant case and the Petition for Writ of Certiorari to the Florida Second District Court of Appeal should be denied.

Alternatively, if this Court has jurisdiction, then in exercising its discretion, this Court should deny certiorari. Petitioner had an opportunity to present his case, but lost on the merits. HCBCJ raised neither sovereign immunity nor jurisdiction as affirmative defenses at the trial court level. After reviewing all relevant evidence, the Circuit Court held that "There is no material disputed issue of fact" and granted HCBCJ's Motion for Summary Judgment as a matter of law on the merits. Petitioner disobeyed the District Court's order to file a supplemental brief, and had his appeal dismissed. Therefore, because Petitioner had an opportunity to present his case but lost on the merits and because he disobeyed the District Court's order to file a supplemental brief, this Court should deny his Petition for Writ of Certiorari to the Florida Second District Court of Appeal.

ARGUMENT

I. This Court lacks jurisdiction to grant the Petition for Writ of Certiorari to the Florida Second District Court of Appeal because Petitioner failed to exhaust state remedies when he bypassed the Florida Supreme Court and directly petitioned this Court for review.

Petitioner failed to exhaust remedies afforded by Florida, thereby depriving this Court of jurisdiction to review the Florida Second District Court of Appeal's dismissal. A litigant must exhaust all avenues of review available in the state's courts in order to seek review of a state court judgment in the United States Supreme Court. *Stratton v. Stratton*, 36 S.Ct. 26, 27 (1915); *American R.R.*

Express Co. v. Levee, 44 S.Ct. 11, 12 (1923). The instant Petition for Writ of Certiorari is addressed to the Florida Second District Court of Appeal and not to the Florida Supreme Court, the highest court in Florida. Petitioner never attempted to invoke the Florida Supreme Court's jurisdiction. Moreover, Petitioner failed to exhaust state remedies when he disobeyed the District Court's order to file a supplemental brief. Therefore, this Court lacks authority to review this case and the Petition for Writ of Certiorari to the Florida Second District Court of Appeal should be denied.

The Florida Supreme Court's jurisdiction to review the instant case is discretionary. *See* Fla. Const. art. V, § 3(b). It has broad subject matter jurisdiction under the Florida Constitution over any opinion of a District Court that contains "a statement or citation effectively establishing a point of law upon which the decision rests." *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988). In the instant case, the Florida Second District Court of Appeal did not affirm or reverse the trial court's judgment, but ordered Petitioner to file a supplemental brief addressing the effect, if any, of *Hill v. Dep't of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, 108 S.Ct. 1024 (1988) and *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA 1989), *review denied*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, 110 S.Ct. 403 (1989), on the disposition of the appeal. Res.App.D.

In *Howlett*, the trial court dismissed the plaintiff's complaint on jurisdictional grounds. *Howlett*, 537 So.2d at 707. Before being reversed by this Court, *Howlett* stood for the proposition that, under *Hill*, Florida's statutory waiver of sovereign immunity did not apply to § 1983 actions brought in state court. *Id.* By per curiam opinion,

the District Court in the instant case dismissed Petitioner's appeal citing to *Hill* and *Howlett*. Res.App.G. Thus, the opinion effectively established a point of law providing the Florida Supreme Court jurisdiction to grant certiorari, which Petitioner never sought to invoke. *See, e.g., Sky Lake Gardens Rec. v. Dist. Ct. of App.*, 511 So.2d 293 (Fla. 1987) (Florida Supreme Court exercised jurisdiction to correct a dismissal for lack of jurisdiction on the part of a District Court of Appeal).

Furthermore, the District Court dismissed Petitioner's appeal only after he disobeyed the court order to file a supplemental brief. Consequently, HCBCJ respectfully submits that the dismissal of the appeal, following Petitioner's failure to comply with the court order, was a procedural matter that appears to be reviewable only by the Florida Supreme Court. *See, e.g., Caldwell v. Estate of McDowell*, 507 So.2d 607 (Fla. 1987) (Florida Supreme Court exercised jurisdiction after District Court of Appeal dismissed for failure to obey the court's order to pay a filing fee). Most important, however, by failing to file a supplemental brief, Petitioner failed to exhaust a state remedy explicitly provided by the Florida Second District Court of Appeal.

The fact that review by Florida's highest court is discretionary is irrelevant. *See American R.R. Express Co. v. Levee*, 44 S.Ct. 11, 12 (1923); *The Florida Star v. B.J.F.*, 530 So.2d 286, 289 (Fla. 1988). Only after jurisdiction is denied by the Florida Supreme Court should this Court consider a Florida appellate court to be the state's highest court. *See American R.R. Express Co.*, 44 S.Ct. at 12. Petitioner must make certain that he can go no farther in the state court system. *Id.* In the instant case, Petitioner failed to

make certain that he could go no farther in the Florida court system because he never attempted to invoke the Florida Supreme Court's jurisdiction.

Petitioner has the burden to affirmatively show that the United States Supreme Court has jurisdiction. *See Gorman v. Washington Univ.*, 62 S.Ct. 1271 (1942) (citing *Memphis Natural Gas Co. v. Beeler*, 62 S.Ct. 857 (1942)). In his brief, Petitioner fails to state that he attempted to invoke the jurisdiction of the Florida Supreme Court, Florida's highest court, thereby failing to meet his burden and show that he exhausted state remedies. Consequently, this Court lacks jurisdiction to review the instant case and should deny the Petition for Writ of Certiorari to the Florida Second District Court of Appeal.

II. If this Court has jurisdiction, then in exercising its discretion this Court should deny the Petition for Writ of Certiorari to the Florida Second District Court of Appeal because neither sovereign immunity nor jurisdiction were raised as affirmative defenses and Petitioner lost on the merits at the trial court level.

In exercising its discretion, this Court should deny the Petition to the Florida Second District Court of Appeal because, unlike *Howlett v. Rose*, 58 U.S.L.W. 4755 (June 12, 1990), the instant case was decided on the merits. In *Howlett*, the trial court dismissed the plaintiff's complaint on jurisdictional grounds, holding that § 1983 causes of action in state court were barred by the doctrine of sovereign immunity. *Id.* at 4756. The Florida Second District Court of Appeal in *Howlett* affirmed and the

Florida Supreme Court declined to exercise its discretionary jurisdiction. *Id.* This Court then granted certiorari, reversed, and remanded the case for disposition on the merits. *Id.* at 4763.

Conversely, Petitioner in the instant case had an opportunity to present his case, but lost on the merits. HCBCJ raised neither sovereign immunity nor jurisdiction as affirmative defenses at the trial court level. After reviewing all relevant evidence, the Circuit Court held that "There is no material disputed issue of fact." Res.App.A,B. The court granted HCBCJ's Motion for Summary Judgment as a matter of law on the merits and denied Petitioner's Motion for Rehearing. Res.App.C. Therefore, because Petitioner's § 1983 cause of action, unlike the plaintiff's in *Howlett*, was decided on the merits, this Court should deny certiorari.

Moreover, Petitioner was not only afforded an opportunity to argue the merits of his case at the trial court level, but to distinguish *Howlett* if necessary to maintain his appeal. Petitioner disobeyed the District Court's order to file a supplemental brief addressing the issue of the effect, if any, of *Hill* and *Howlett* on the disposition of the appeal. Res.App.D. Instead, Petitioner filed a Motion to Hold his Appeal in Abeyance Pending the United States Supreme Court's Decision in *Howlett v. Rose*. Res.App.E. Although his motion was denied, Petitioner stated in it that "If the Supreme Court reverses this Court's decision in *Howlett*, then neither *Howlett* nor *Hill* will have any effect on the pending appeal before this Court." Res.App.E,F. This Court subsequently reversed *Howlett*, and that reversal should have no effect on the instant case in that Petitioner already lost on the merits.

Furthermore, in his Petition for Writ of Certiorari, Petitioner stated that he adopts the arguments made to this Court by the Petitioner in *Howlett*. However, Petitioner failed to make these arguments himself, or to distinguish the instant case from *Howlett*, when the District Court provided him the opportunity. Consequently, Petitioner waived any constitutional arguments that could have been raised to the District Court. *See Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970) ("Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised.")

Therefore, because Petitioner had an opportunity to present his case but lost on the merits, because he disobeyed the District Court's order to file a supplemental brief, and because he waived any constitutional arguments that he failed to raise in the District Court, this Court, in exercising its discretionary jurisdiction, should deny his Petition for Writ of Certiorari to the Florida Second District Court of Appeal.

CONCLUSION

For the foregoing reasons, HCBCJ respectfully submits that this Court lacks jurisdiction to grant the Petition for Writ of Certiorari addressed to the Florida Second District Court of Appeal and not Florida's Supreme Court, the highest court in Florida. Petitioner failed to exhaust state remedies when he bypassed the Florida Supreme Court and directly petitioned this Court for review.

Alternatively, HCBCJ respectfully requests that this Court, in exercising its discretion, deny the Petition for Writ of Certiorari because Petitioner had an opportunity to present his case, but lost on the merits. HCBCJ raised neither sovereign immunity nor jurisdiction as affirmative defenses. Consequently, the instant case is distinguishable from *Howlett v. Rose*, and this Court should deny certiorari.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX A

IN THE CIRCUIT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA CIVIL DIVISION

BRADLEY ARTHUR,

Plaintiff

v.

LEROY EDWARDS,
MICHAEL WYGEN,
HILLSBOROUGH BOARD OF
CRIMINAL JUSTICE

Defendants

_____/

Case No. 84-13363
Division "W"

HILLSBOROUGH COUNTY BOARD OF
CRIMINAL JUSTICE
MOTION FOR SUMMARY JUDGMENT
AS TO COUNT III

The Hillsborough County Board of Criminal Justice, by and through its undersigned attorneys, moves the court for entry of a Summary Judgment and in support of said motion says:

1. There is no genuine issue and this Defendant is entitled to summary judgment as a matter of law. There are no material disputed facts and the undisputed facts, including the pleadings, depositions and affidavits[1] on file, show that the Hillsborough County Board of Criminal Justice is entitled to Summary Judgment as a matter of law.

---

[1] Filed herewith are the affidavits of Sheriff Heinrich and Colonel Parrish.

2. The Plaintiff has brought suit against the Hillsborough County Board of Criminal Justice pursuant to *42 USC § 1983*[2] (Civil Rights Statute) for negligence in:

a. employing two officers who "beat up Plaintiff";

b. continuing to employ Officer Edwards with prior knowledge of his violence towards inmates;

c. Failing to allow Plaintiff to make phone calls, proximately causing the Plaintiff's beating.

3. Defendant Hillsborough County Board of Criminal Justice is entitled to summary judgment because the undisputed facts in this case show that there is no liability because no *vicarious liability* exists under *42 USC § 1983*.

4. To show governmental responsibility, Plaintiff must show a *"policy or custom"* which violated Plaintiff's constitutional rights, and an *"isolated incident"* is insufficient to show this.

5. Negligence is not actionable under *42 USC § 1983*.

---

[2] This is the only cause of action alleged against the Board of Criminal Justice in this case.

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.

By: James E. Thompson
JAMES E. THOMPSON, ESQUIRE
P.O. BOX 1438
Tampa, Florida 33601
(813) 228-7411
Florida Bar No. 081058
Attorney for Defendant
Hillsborough County Board
of Criminal Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery, to JEREMY E. GLUCKMAN, ESQUIRE, 725 East Kennedy Boulevard, Tampa, Florida, 33602; JACK M. LARKIN, ESQUIRE, 806 East Jackson Street, Tampa, Florida, 33602; and ROBERT FOSTER, ESQUIRE, 412 Madison Street, Suite #1207, Tampa, Florida, 33602.

/s/ James E. Thompson
JAMES E. THOMPSON, ESQUIRE
Sept. 23, 1988

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA, CIVIL DIVISION

BRADLEY ARTHUR,

Plaintiff

v.

Case No. 84-13363

Division "W"

LEROY EDWARDS,
MICHAEL WYGEN,
HILLSBOROUGH BOARD OF
CRIMINAL JUSTICE

Defendants

_____/

AFFIDAVIT OF SHERIFF WALTER C. HEINRICH

1. My name is Walter C. Heinrich.

2. I am Sheriff of Hillsborough County. I was also Sheriff of Hillsborough County during the time period relative to the Complaint in this case.

3. I was also Executive Director of the Board of Criminal Justice during the time period relative to this case. I have knowledge of the policies and procedures of the Hillsborough County Board of Criminal Justice. This is so because I was in charge of the operation of the Hillsborough County Jail as Executive Director if the Hillsborough County Board of Criminal Justice during the time period relative to this case. I and the other members of the Hillsborough County Board of Criminal Justice were the only persons with final policy making authority over the activities and operation of the jail.

4. It was my policy and a policy of the Hillsborough County Board of Criminal Justice that correctional officers who struck or assaulted inmates be disciplined and terminated from employment if necessary.

5. It was also my policy, as Executive Director of the Board of Criminal Justice, and the policy of the Board of Criminal Justice that any correctional officer who assaulted an inmate be disciplined according to Civil Service Rules. It was also a policy of the Hillsborough County Board of Criminal Justice that incident reports were completed by Board of Criminal Justice officers any time an inmate was involved in an altercation of any sort with deputies.

6. It was the policy of the Hillsborough County Board of Criminal Justice to review the incident reports of each incident where an inmate was involved in an assault or battery with or upon a correctional officer.

7. It was the Hillsborough County Board of Criminal Justice policy that any person in supervisory authority, who had knowledge of a jail deputy's assault on an inmate, should report the matter through the chain of command so that disciplinary proceedings could be started for violation of Hillsborough County Board of Criminal Justice policies. Also, if necessary, criminal prosecution could be brought against the correctional officer.

8. Any action of any member of the Sheriff's Office contrary to the above is contrary to the express policies and customs of the Hillsborough County Board of Criminal Justice.

Further affiant sayeth not.

/s/ Walter C. Heinrich
WALTER C. HEINRICH, SHERIFF

SWORN TO AND SUBSCRIBED
before me this 23rd day
of September, 1988.
/s/ Diana Osgood
Notary Public, State of Florida at Large
NOTARY PUBLIC STATE
OF FLORIDA MY
COMMISSION EXP.
APR. 10, 1991

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA, CIVIL DIVISION

BRADLEY ARTHUR,

Plaintiff

v.

LEROY EDWARDS,
MICHAEL WYGEN,
HILLSBOROUGH BOARD OF
CRIMINAL JUSTICE

Defendants

Case No. 84-13363
Division "W"

_____/

AFFIDAVIT OF COLONEL DAVID PARISH

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

1. My name is Colonel David Parrish. I am commander of the Hillsborough County Jail and have knowledge of its records, policies and procedures.

2. Although I took the job of Division Commander of the Jail in August of 1981, I am familiar with the facts of Plaintiff's case, whereby Plaintiff was physically assaulted by Correctional Officer Leroy Edwards, through my review of the records of the case.

3. I am authorized Records Custodian of the Hillsborough County Jail and have reviewed the Bradley Arthur inmate file, together with the Incident Report, a Hillsborough County Sheriff's Officer business record and the Offense Report of the above Plaintiff's assault, which is a business record of the Hillsborough County Sheriff's Office.

4. Through my knowledge of Hillsborough County Jail personnel during the time period of my employment and my position of Commander of the Hillsborough County Jail system, I am familiar with the policies and customs, both informal and formal, of the Hillsborough County Sheriff's Office and the Hillsborough County Board of Criminal Justice.

5. The Sheriff's Office and Hillsborough County Board of Criminal Justice have had, and continue to have a policy or custom of doing criminal history checks upon applicants prior to their employment with the Hillsborough County Sheriff's Office. According to my review

of Leroy Edwards' personnel file, a criminal history check was done prior to his employment and he had committed no criminal offenses, either violent or nonviolent, prior to his employment with the Hillsborough County Sheriff's Office.

6. At all times pertinent to the Complaint and at least since 1973, the Hillsborough County Board of Criminal Justice has been under regulation by Civil Service Board Rules. Termination of employees from employment must have been made pursuant to those Civil Service Rules. I reviewed the disciplinary records, employment application and criminal history section of Leroy Edwards personnel file and found no documentation or complaints whereby Leroy Edwards could or should have been terminated from employment pursuant to Civil Service Rules prior to the incident in this case. Accordingly, the Board of Criminal Justice was required to continue his employment prior to this incident.

7. The Hillsborough County Sheriff's Office has an affirmative policy of disciplining and terminating from employment, if necessary, correctional officers who strike inmates. This has been the policy of the Office since I took command of the Jail in 1981 and was so prior to that time from my knowledge of the Hillsborough County Jail system, its officers, policies and records.

8. Consistent with the above Sheriff's Office policy, Leroy Edwards was terminated from employment and referred for prosecution to the State Attorney's Office as a result of the incident in this case.

Further affiant sayeth not.

/s/ David M. Parrish
COLONEL DAVID PARRISH

SWORN TO AND SUBSCRIBED
before me this 21st day
of September, 1988.

/s/ Rose E. Stanton
Notary Public, State of Florida at Large
NOTARY PUBLIC STATE
OF FLORIDA MY
COMMISSION EXP.
APR. 12, 1990

APPENDIX B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA CIVIL DIVISION

BRADLEY ARTHUR,

Plaintiff,

vs.

LEROY EDWARDS and HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE,

Defendants.

CASE NO: 84-13363

DIVISION: "W"

ORDER GRANTING SUMMARY JUDGMENT AND SUMMARY JUDGMENT

THIS CAUSE came on to be heard after due notice on October 19, 1988, on the Motion For Summary Judgment of Defendant Hillsborough County Board of Criminal Justice, and the Court having heard argument of counsel and having considered the pleadings, affidavits and depositions on file in this case, and being otherwise fully advised in the premises, finds:

1. There is no material disputed issue of fact.

2. Based on the undisputed facts, there was no evidence that Hillsborough County Board of Criminal Justice authorized or ratified the alleged attack on Plaintiff.

3. Based on the undisputed facts, there was no evidence that the alleged assault and battery on the Plaintiff was done pursuant to a policy, custom or procedure, prescribed or permitted by the Hillsborough County

Board of Criminal Justice, but on the contrary the undisputed evidence shows that such conduct, as alleged on the part of the Correctional Officer, would be against the policy, custom and procedure of the Hillsborough County Board of Criminal Justice.

4. The hiring policy of the Hillsborough County Board of Criminal Justice, as established by the affidavits on file, is reasonably adequate and does not show an unconstitutional course of action or policy.

5. The affidavit of a clinical psychologist, that the background search policy should have included a review of the applicant's medical record, is not sufficient to raise a material issue of fact as to permit a finding that the employment policy of the Hillsborough County Board of Criminal Justice was unconstitutional.

6. That a search of military records would have revealed that the Correctional Officer was involved in a fist fight for which he was disciplined twenty years prior to the application for employment, and twenty-six years prior to the alleged battery upon Plaintiff for which the Correctional Officer was promptly fired, is not sufficient to raise a material issue of fact on the question of the sufficiency of the employment procedures, that would rise to the standing of a constitutional deprivation actionable under the Federal Civil Rights Statutes.

7. Under the Civil Rights Statute, liability can be established on the Hillsborough County Board of Criminal Justice only if it deliberately chose to follow an unconstitutional course of action, or if the conduct of the Correctional Officer complained of was implementing an unconstitutional policy or custom which caused injury to

the Plaintiff. *Lowe v. City of St. Louis*, 843 F.2d 1158, 1160, (8th Cir. 1988). The absence of any such policy or custom was established by Defendant's affidavits and not refuted.

8. Although the Court has not found that the hiring in this case was negligent, even if it were it would not amount to a constitutional deprivation, as "a single incident of grossly negligent hiring without more does not constitute official policy . . . ". *Parker v. Williams*, Case Nos: 86-7233, 86-7369, September 20, 1988, U.S.C.A. Eleventh Circuit, Slip p. 4638. *See also*: *Geter v. Wille*, 846 F.2d 1352, (11th Cir. 1988), and *Lowe v. City of St. Louis*, 843 F.2d 1158, (8th Cir. 1988).

It is therefore

ADJUDGED and ORDERED:

That the Motion For Summary Judgment of the Defendant, Hillsborough County Board of Criminal Justice is granted, and it is further

ADJUDGED AND ORDERED:

That Plaintiff, Bradley Arthur take nothing by his complaint and that the Defendant, Hillsborough County Board of Criminal Justice go hence without day. Jurisdiction is reserved for the purpose of taxing costs.

DONE and ORDERED in Chambers at Tampa, Hillsborough County, Florida this 31 day of October, 1988.

Morison Buck
MORISON BUCK, CIRCUIT JUDGE

Copies to:

JAMES E. THOMPSON, ESQ.
JEREMY GLUCKMAN, ESQ.
ROBERT A. FOSTER, JR., ESQ.
BURTON W. WIAND, ESQ.

APPENDIX C

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA CIVIL DIVISION

BRADLEY ARTHUR,

Plaintiff,

vs.

LEROY EDWARDS and HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE,

Defendants.

CASE NO: 84-13363

DIVISION: "W"

ORDER DENYING MOTION FOR REHEARING

THIS CAUSE came on to be heard after due notice on January 12, 1989, on the Motion For Rehearing of the Plaintiff, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is therefore

ADJUDGED and ORDERED that Plaintiff's Motion For Rehearing be and the same is hereby denied.

DONE and ORDERED in Chambers at Tampa, Hillsborough County, Florida this 13 day of January, 1989.

Morison Buck
MORISON BUCK, CIRCUIT JUDGE

Copies to:

JAMES E. THOMPSON, ESQ.
JEREMY GLUCKMAN, ESQ.

APPENDIX D

IN THE SECOND DISTRICT COURT
OF APPEAL, LAKELAND, FLORIDA

DECEMBER 18, 1989

BRADLEY ARTHUR, Appellant,	)	
v.	)	Case No. 89-00435
HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE, Appellee.	)	

ORDER

Counsel for appellant is directed to submit to this court within twenty days of this order, a supplemental brief addressing the issue of the effect, if any, of the decisions in *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987) and *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA 1989) on our disposition of this appeal. Counsel for appellee then shall have ten days in which to respond to appellant's brief.

A TRUE COPY
ATTEST:

/s/ William A. Haddad
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Bruce Rogow, Esquire
2097 S.W. 27th Terrace
Ft. Lauderdale, Fla. 33312

James E. Thompson, Esquire
P.O. Box 1438
Tampa, Fla. 33601

APPENDIX E

IN THE SECOND DISTRICT COURT
OF APPEAL, LAKELAND, FLORIDA

BRADLEY ARTHUR,

Appellant,

v.

Case No.
89-00435

HILLSBOROUGH COUNTY BOARD
OF CRIMINAL JUSTICE,

Appellee.

MOTION TO HOLD THIS APPEAL IN ABEYANCE
PENDING THE UNITED STATES SUPREME
COURT'S DECISION IN *HOWLETT V. ROSE*

After oral argument in this case the Court asked the parties to address "the issue of the effect, if any, of the decisions in *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987) and *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA 1989) on our disposition of this appeal." Order of December 18, 1989.

This Court's decision in *Howlett* was explicitly based upon *Hill*. 537 So.2d at 707. The United States Supreme Court granted certiorari in *Howlett* on November 13, 1989. *Howlett v. Rose*, No. 89-5383, *in forma pauperis and certiorari granted*, 58 L.W. 3320. The question presented is:

> Are Florida school board and its local school officials, by virtue of sovereign immunity of state, immune from suit in action brought against them in Florida court pursuant to 42 U.S.C. §1983?

58 L.W. 3343. The Petitioner's Brief is to be filed this week. The case should be argued and decided by the end of the Supreme Court's term (July, 1990).

If the Supreme Court reverses this Court's decision in *Howlett*, then neither *Howlett* nor *Hill* will have any effect on the pending appeal before this Court. If *Howlett* is completely affirmed, then *Howlett* could be avoided by the present appellant on two theories: (1) the defendant Hillsborough County Board of Criminal Justice never raised *Howlett*, *Hill* or sovereign immunity below, nor in its Brief in this Court; (2) the Hillsborough County Board of Criminal Justice does not qualify as an agency entitled to immunity because its function is a purely local one of running a county jail.

Rather than speculate, or engage in decision-making which might then subject this case to either party seeking further review to protect its rights pending the Supreme Court outcome of *Howlett*, counsel for Appellant (with Appellant's consent) respectfully suggests that the Court hold this appeal in abeyance pending the Supreme Court's decision in *Howlett*. If the Court concurs, the Order should also require that Appellant file a supplemental Brief on the Supreme Court's *Howlett* effect on this appeal within twenty days of the Law Week publication of the decision.

That approach would be fair to the parties and the Court. If *Howlett* is reversed this Court's *Howlett* decision will have no bearing on this appeal. If it is affirmed in any way, the parties will be able to address its impact in

light of the Supreme Court's language, which may present additional reasons, one way or the other, for applying (or not applying) *Howlett* here. Meanwhile, this Court would not have to write an opinion which may be obviated, or rendered superfluous or incorrect by the impending United States Supreme Court decision in *Howlett v. Rose*.

CONCLUSION

For the foregoing reasons Appellant requests that the Court hold this appeal in abeyance pending the Supreme Court decision in *Howlett*, with directions that the Appellant file a supplemental Brief within twenty days of *Howlett*'s publication in Law Week, and granting the Appellee ten days in which to respond to that Brief.

Respectfully submitted,

BRUCE ROGOW, Fla. Bar No. 067999
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(305) 524-2465

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to JAMES E. THOMPSON, ESQ., P. O. Box 1438, Tampa, Florida 33601, by U.S.Mail this 10th day of January, 1990.

BRUCE ROGOW

APPENDIX F

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JANUARY 19, 1990

BRADLEY ARTHUR,

Appellant,

v.

Case No.
89-00435

HILLSBOROUGH COUNTY BOARD
OF CRIMINAL JUSTICE,

Appellee.

_____/

Counsel for appellant having filed a motion to hold this appeal in abeyance pending the United States Supreme Court's decision in *Howlett v. Rose*, upon consideration, it is ordered that the motion is hereby denied.

A TRUE COPY
ATTEST:

/s/ William A. Haddad
by cs
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Bruce Rogow, Esq.
James E. Thompson, Esq.

/BB

APPENDIX G

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

BRADLEY ARTHUR, Appellant,	)	Case No. 89-00435
v.	)	
HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE, Appellee.	)	

Opinion filed February 21, 1990.

Appeal from the Circuit Court for Hillsborough County; Morison Buck, Judge.

Bruce Rogow, Ft. Lauderdale, for Appellant.

James E. Thompson of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, for Appellee.

PER CURIAM.

Dismissed *See Hill v. Dep't of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1024 (1988); *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA), *review denied*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 403 (1989).

LEHAN, A.C.J., and FRANK and PARKER, JJ., Concur.

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 89-1915

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1989

BRADLEY ARTHUR,

Petitioner,

v.

HILLSBOROUGH COUNTY BOARD
OF CRIMINAL JUSTICE,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Bruce S. Rogow
Nova University Law Center
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315
(305) 524-2465

Counsel for Petitioner

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PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN
OPPOSITION TO CERTIORARI

The Respondent misunderstands the plain meaning of the decision below and misstates the plain holding of The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988). This Court has jurisdiction to grant certiorari. This Court's decision in Howlett v. Rose, ___U.S.__ (June 12, 1990) makes the granting of certiorari and vacating of the decision below both appropriate and a result which is consistent with the Florida appellate court's stay of its mandate pending this Court's Howlett decision.

A. Jurisdiction

The Respondent suggests that after the Florida Second District Court of Appeal dismissed Petitioner's case citing Hill v. Dep't of Corrections, 513 So.2d 129 (Fla. 1987) and Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), Petitioner should have sought to invoke the Florida Supreme Court's discretionary review jurisdiction, because Florida

Star said that the Florida Supreme Court had "jurisdiction under the Florida Constitution over any opinion that contains 'a statement or citation effectively establishing a point of law upon which the decision rests.'" Respondent's Brief in Opposition, p.5.

The Respondent failed to quote the Florida Star footnote which makes clear that the Florida Supreme Court had no jurisdiction in this case:

> This Court does not, however, have subject matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court. Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this court, or has been reversed on appeal

> or review, or receded from by this court, or unless the citation notes a contrary holding of another district court of this court.

The Florida Star v. B.J.F., 530 So.2d at 288, n.3 (emphasis supplied, citation omitted). The District Court of Appeal's citations to Hill v. Dep't of Corrections and Howlett v. Rose provided no basis for Florida Supreme Court jurisdiction, making direct review by this Court the appropriate route.

The Respondent's assertion that the Florida District Court of Appeal dismissed Petitioner's case for failure to file a supplemental brief addressing the effect of Hill and Howlett is equally disingenuous. Responding to the court's inquiry about the effect of Hill and Howlett, Petitioner asked that the court hold his appeal in abeyance, pending this Court's decision in Howlett v. Rose. Respondent's Appendix to Brief in Opposition to Certiorari, pp.16a-18a. The District Court of Appeal declined to do so, id. at 19a, and

then decided the appeal solely based on Howlett and its precursor, Hill. Id. at 20(a); Petitioner's App.1-2.

There is absolutely no doubt that the Florida District Court of Appeal decision below was strictly a re-application of its Howlett decision. Indeed, the District Court of Appeal decision to grant Petitioner's Motion to Stay the Mandate pending this Court's decision in Howlett (Petitioner's App.10) confirms the decision below was based on Howlett, not because, as Respondent says, Petitioner "disobeyed the court order to file a supplemental brief." Respondent's Brief in Opposition to Certiorari, p.6.

Since there was no jurisdiction in the Florida Supreme Court, and the decision below was squarely based upon Howlett v. Rose, there is no impediment to this Court's jurisdiction.

B. The Decision Below Was Not Decided On The Merits Of The §1983 Action

The Respondent states that the decision below was "on the merits" of Petitioner's §1983 action, and therefore the Howlett issue is not before this Court. Respondent's Brief in Opposition, pp.7-9.

That assertion is startling considering the opinion below. The simple citations to Hill and Howlett leave no doubt that sovereign immunity, not the merits, were the basis of the decision below. The merits of Petitioner's appeal from the trial court's entry of summary judgment were not decided by the District Court of Appeal, therefore the Respondent's claim to the contrary is completely erroneous.

This case is a replay of Howlett. It deserves the same treatment -- reversal and a remand for disposition on the merits.

CONCLUSION

The Respondent's arguments against jurisdiction are so devoid of merit that double costs should be ordered pursuant to Supreme Court Rule 43.7 once the Court grants certiorari and vacates the decision below in light of its June 12, 1990 decision in Howlett v. Rose.

Respectfully submitted,

BRUCE S. ROGOW
Nova University Law Center
3100 S.W. 9th Avenue
Fort Lauderdale, FL 33315
(305) 524-2465

Counsel for Petitioner

DATED: July 12, 1990.

lm-d73